Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996

CC Docket No. 96-187

NYNEX REPLY COMMENTS

The NYNEX Telephone Companies

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TABLE OF CONTENTS

SUMMARY i

I. THE STATUTE MEANS EXACTLY WHAT IT SAYS -- STREAMLINED TARIFFS SHALL BE "DEEMED LAWFUL," NOT MERELY PRESUMED LAWFUL (PARAS. 7-15) 1

II. THE COMMISSION HAS NO AUTHORITY TO DEFER THE EFFECTIVE DATE OF STREAMLINED TARIFFS (PARA. 6) 6

III. STREAMLINING SHOULD APPLY TO ALL TARIFFS (PARAS. 16-18) 8

IV. THE COMMISSION HAS THE POWER, AND THE RESPONSIBILITY, TO EXERCISE ITS FORBEARANCE AUTHORITY UNDER SECTION 10(A) OF THE ACT TO DETARIFF LEC TARIFFS (PARA. 19) 9

V. INDUSTRY STANDARDS ARE NEEDED FOR ELECTRONIC FILING (PARAS. 21-22) 10

VI. THE COMMISSION SHOULD REVIEW MOST FILINGS BEFORE THEY BECOME EFFECTIVE, BUT IT SHOULD NOT ADOPT BURDENSOME FILING REQUIREMENTS AS PART OF SUCH REVIEW (PARAS. 23-26). 12

VII. THE COMMISSION SHOULD ESTABLISH REALISTIC FILING PERIODS FOR PETITIONS AND REPLIES FOR STREAMLINED TARIFF FILINGS (PARAS. 27-28) 13

VIII. THE COMMISSION SHOULD IMPOSE A STANDARD PROTECTIVE ORDER FOR *CONFIDENTIAL LEC INFORMATION* (PARA. 29) 15

IX. THE COMMISSION SHOULD STREAMLINE ANNUAL ACCESS TARIFF FILINGS (PARAS. 30-31) 16

X. CONCLUSION 18

SUMMARY

Several commenters try to convince the Commission to ignore the clear words of the Communications Act. They argue that the Commission should not follow Congressional directive that streamlined tariffs under Section 204(a)(3) of the Act shall be "deemed lawful," because it would change decades of "settled law." They argue that the Commission should interpret the provision that a LEC may file a tariff for a "new or revised charge, classification, regulation, or practice on a streamlined basis" to include only tariffs that reduce or increase rates, which would exclude tariffs that propose new services or that change terms and conditions. They also argue that the Commission can ignore the 7 and 15 day notice periods for streamlined tariffs by deferring such tariffs for up to 120 days.

None of these proposals is consistent with the Act. The Commission does not have the power to change the terms of the Act or to second-guess the Congressional decision to provide for streamlined tariff filings. It should have come as no surprise to those commenters that Section 204(a)(3) changes "settled law" -- the purpose of the Telecommunications Act of 1996 was to replace 60 years of monopoly-based regulation with a deregulatory, competitive framework. Streamlined tariff filings are an integral part of the Congressional effort to replace regulatory controls with the discipline of a competitive market. The Commission should give full force and effect to Section 204(a)(3) by treating the rates in streamlined tariffs that become effective as the "lawful" rates; by

allowing all tariffs to be eligible for streamlined treatment, and by adhering to the 7 and 15 day notice periods for such tariffs.

There is widespread support in the comments for electronic filing and posting of tariffs and associated pleadings. However, electronic filing will not be feasible without industry standards to ensure that documents can be filed and retrieved by all parties efficiently and with the proper formatting. The Commission should convene an industry working group to develop appropriate standards.

The Commission should reject proposals to require more burdensome information and cost support requirements for streamlined tariffs. The Commission should also reject proposals to require pre-filing of data and to require advance notice of streamlined tariff filings. These proposals are inconsistent with the concept of streamlined tariff filings, and they are directly contrary to one of the primary goals of the Telecommunications Act of 1996 -- to reduce the regulatory burdens on telecommunications carriers.

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NYNEX REPLY COMMENTS

The NYNEX Telephone Companies[1] ("NYNEX") hereby file their Reply to the Comments that were filed in response to the Commission's Notice of Proposed Rulemaking ("*NPRM*"), released September 6, 1996 in the above-referenced proceeding.

I. The Statute Means Exactly What It Says -- Streamlined Tariffs Shall Be "Deemed Lawful," Not Merely Presumed Lawful (Paras. 7-15)

Several commenters go to great lengths to convince the Commission that it should defy the explicit words of its enabling statute. They argue that it would reverse decades of "settled law" if the Commission followed the Congressional directive that streamlined tariffs are to be "deemed lawful" if not

[1] The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

suspended and investigated before they go into effect.[2] They urge the Commission to change the words "deemed lawful" to "presumed lawful" to avoid changing the legal status of filed tariffs. They contend that the Commission need not follow the clear words of the statute, because Congress did not do a good enough job of explaining to the Commission that it really wanted to change the law.

These arguments are preposterous. There is nothing unusual about a statute that changes "settled law" -- that is what legislation normally does. Congress has no need to justify its actions to the Commission. When Congress changes the law, the Commission's job is to implement those changes, not, as the commenters propose, to second-guess them.

There is no question that Congress specifically intended to change "settled law." The commenters must have missed the fact that, in the Commission's own words, the Telecommunications Act of 1996 "fundamentally changes telecommunications regulation."[3] It was the most comprehensive revision of the Communications Act in 60 years. It was designed "to provide for a pro-competitive, de-regulatory national policy framework" for the

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[2] *See, e.g.*, AT&T at p. 6; ACTA at pp. 4-8; Cap Cities at pp. 3-4.

[3] *See* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325, released August 8, 1996, para. 1.

telecommunications industry.[4] The provisions for streamlined tariff filings are part and parcel of the Congressional effort to replace regulation with the discipline of the competitive market.

Prior to passage of the Telecommunications Act of 1996, an effective tariff was the "legal rate," but not the "lawful rate," unless and until the Commission concluded that the rate was lawful in an investigation under Sections 204 or 208, or until it prescribed rates under Section 205. The legal rate was binding on the carrier and its customers, but a carrier could be required to make refunds if the Commission later found that the legal rate was not "lawful."[5] This subjected the local exchange carriers ("LECs") to unlimited liability, since the Commission could investigate any rate at any time, and since it rarely used its Section 205 power to prescribe rates. When Congress stated that streamlined tariffs shall be "deemed lawful," it made the rates in streamlined tariffs the "lawful" rates. The commenters should not be surprised that this insulates the LECs from liability for damages -- that is what the "lawful" rate does.

Some of the commenters try to change the word "deemed" to "presumed," so that the rates in streamlined tariffs will not be the lawful rates until after the Commission so finds in an investigation.[6] It is not within the

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[4] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., p. 113 (1996).
[5] *See* Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932).
[6] *See, e.g.*, AT&T at pp. 6-7; CompTel at pp. 1-3; Frontier at pp. 2-3.

Commission's power to rewrite the statute. The Commission's interpretation of unambiguous statutory language is not entitled to Chevron deference,[7] and few words are as clear as the word "deem." Black's Law Dictionary defines "deem" as "to hold, consider, adjudge, believe, condemn, determine, treat as if, construe."[8] Contrary to AT&T's contention,[9] these terms do not connote a presumption. When Congress uses the word "deemed" in the Communications Act, it creates a legal or factual conclusion.[10] The Commission should conclude that Congress meant exactly what it said -- that streamlined tariffs will be deemed the lawful rate unless and until the Commission reaches a contrary finding in an investigation.

Several commenters complain that the Commission should not "deem lawful" streamlined tariffs because that would allow the LECs to charge unlawful rates until a tariff investigation was concluded, and that this would expose customers to financial harm.[11] There are two flaws in this argument. First, it is not the Commission's prerogative to disregard the terms of the Act simply because it believes that the Act is bad policy. Second, the commenters miss the point of the Telecommunications Act of 1996. It was designed to

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[7] *See* Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[8] The normal dictionary definition is similar -- "to come to think or judge; to have an opinion." Webster's Ninth New Collegiate Dictionary, p. 332.

[9] *See* AT&T, n. 13.

[10] *See, e.g.*, 47 U.S.C. Sections 153(10); 160(c).

[11] *See, e.g.*, TRA at pp. 3-5; CompTel at pp. 2-3.

replace regulatory controls over unreasonable prices with marketplace controls. It eliminates the local exchange monopoly, and with it the ability of the incumbent LECs to charge above-market rates. The tariff streamlining provisions take effect one year after enactment of the Telecommunications Act of 1996. By that time, most of the provisions of the Act that were designed to open the local exchange market to competition and to create a level playing field for all competitors will have taken effect, including (1) the negotiation and arbitration of interconnection agreements under Sections 251 and 252; (2) implementation of the universal service provisions of Section 254; and (3) removal of State barriers to entry pursuant to Section 253. Customers will have alternatives if they are not satisfied with LEC rates, and any complaints that they file with the Commission will have to be resolved in a short time period -- no longer than 5 months. The Act carefully balances the reduction in regulatory controls with the expected increase in competition. The Commission should not try to re-write the Act, or to impose regulatory controls that Congress has determined are no longer necessary.

For these reasons, the Commission should give full force and effect to the Congressional directive that streamlined tariffs shall be deemed lawful. Until such tariffs are found unlawful pursuant to a Commission investigation, they are the lawful rates, and a LEC is not liable for damages or refunds while such lawful rates are in effect.

II. The Commission Has No Authority To Defer The Effective Date Of Streamlined Tariffs (Para. 6)

Several commenters disagree with the Commission's tentative conclusion that Congress intended to foreclose the Commission from using its authority under Section 203(b)(2) of the Act to defer for up to 120 days the effective dates of tariffs that the LECs file on a streamlined basis.[12] They argue that Congress did not modify Section 203(b)(2), and that the 7 and 15 day periods specified in Section 204(a)(3) only apply to the periods during which the Commission may consider whether to suspend a streamlined tariff filing. AT&T argues that it is illogical to conclude that Congress would limit the Commission's power to defer the tariffs of "ILEC monopolists," while allowing the Commission to defer the tariffs of competitive carriers.[13] MCI argues that the Commission can defer streamlined tariff filings for up to 120 days if they do not concern increases or decreases in rates.[14]

These arguments are inconsistent with the clear terms of the Act. First, there is no overriding "deferral" authority in Section 203. Section 203(b)(1) states that tariffs shall be filed on 120 days' notice. Section 203(b)(2) states that the Commission may modify the requirements of "this section," either by rule or otherwise, provided that it may not require tariffs to be filed on more than 120

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[12] *See, e.g.,* AT&T at pp. 2-3; ACTA at pp. 1-4.
[13] *See* AT&T at pp. 3-4.
[14] *See* MCI at pp. 2-3.

days' notice. Thus, where the Commission has adopted a rule that allows a tariff to be filed under Section 203 on less than 120 days' notice, it may defer such a tariff up to the maximum notice period required by Section 203. However, these notice provisions do not apply to streamlined tariff filings, which are covered by a different section of the Act, Section 204. Thus, the Commission may not invoke the 120 day notice period of Section 203 to extend the notice periods of streamlined tariffs.[15]

AT&T is incorrect in arguing that Congress could not have intended to reduce the notice periods for tariff filings only by incumbent LECs, and to allow the Commission to defer the tariffs of "competitive" carriers for up to 120 days. Congress was presumably aware that the Commission's rules allow non-dominant carriers (which now includes the most dominant interexchange carrier -- AT&T) to file tariffs on as little as one days' notice.[16] Deferral of such tariffs is exceedingly rare. Only the incumbent LECs need the ability to file streamlined tariffs. Congress met this need by enacting Section 204(a)(3).

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[15] MCI's argument that the notice provisions of Section 204(a)(3) do not apply to streamlined tariffs that are neither rate increases or rate decreases are dealt with in the following section. NYNEX demonstrates that Section 204(a)(3) applies to all tariffs proposing new or revised rates, terms or conditions, and that the references to rate increases and rate decreases are illustrative, but not exclusive.

[16] *See* 47 C.F.R. Section 61.23(c).

III. Streamlining Should Apply To All Tariffs (Paras. 16-18)

Several commenters argue that the Commission should not allow the LECs to file tariffs proposing new services on a streamlined basis.[17] They also argue that tariffs that propose only changes in terms and conditions should not be given streamlined treatment.[18] These arguments are based on the theory that the second sentence of Section 204(a)(3), which states that a streamlined tariff "shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates)" limits the scope of the first sentence, which states that a LEC may file "a new or revised charge, classification, regulation or practice on a streamlined basis," because the second sentence only refers to increases or decreases in rates.

This is poor statutory construction. The phrase "new or revised charge, classification, regulation or practice" is used consistently in Section 204 to refer to all tariff revisions, including those that introduce new services, that increase, reduce, or eliminate rates for existing services, and that change only terms and conditions.[19] The second sentence in Section 204(a)(3) cannot be read to nullify the terms "new" and "classification, regulation or practice" in the first sentence, such that only rate reductions and increases would be left. The references to rate reductions and rate increases are parenthetical. They provide examples of the

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[17] *See, e.g.*, CompTel at p. 3; MCI at p. 15; MFS at p. 2.
[18] *See, e.g.*, MCI at p. 14; McLeod at p. 4.
[19] *See* NYNEX at pp. 12-14.

types of tariff filings that would fall into either the 7 or 15 day notice periods. The phrase "in the case of" clearly is intended to provide an instance or example of the type of streamlined tariff that would fall into one category or the other.

If Congress had intended to limit streamlined tariffs to increases or decreases in existing rates, it would not have had to include the terms "new" or "classification, regulation or practice" in Section 204(a)(3). The Commission should conclude that Congress put those words into the statute to give them full effect, consistent with their meaning elsewhere in Section 204. Therefore, the Commission should adopt its tentative conclusion that all tariff filings involving existing services, including tariffs changing terms and conditions, are eligible for streamlined treatment, and it should find that tariffs proposing new services also are eligible for streamlined treatment.

IV. The Commission Has The Power, And The Responsibility, To Exercise Its Forbearance Authority Under Section 10(a) Of The Act To Detariff LEC Tariffs (Para. 19)

CompTel argues that the Commission cannot use its authority under Section 10(a) of the Act to forbear from requiring the LECs to meet the notice requirements of Section 204(a)(3), or from requiring the LECs to file tariffs in general.[20] According to CompTel, the "general" provisions of Section 10(a) do not override the "specific" provisions of Section 204(a)(3).

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[20] *See* CompTel at pp. 4-6.

CompTel completely misinterprets the meaning of Section 10(a). It is not a general provision concerning tariffs. It is a provision that gives the Commission authority to forbear from applying "any regulation or any provision of this Act" to telecommunications carriers under certain circumstances. It overrides any provision of the Act, including Section 204, if the Commission makes the findings required by Sections 10(a)(1) through (a)(3). Moreover, Section 10(a) is not discretionary -- it states that the Commission "shall" forbear if the prerequisite conditions are met. Therefore, the Commission clearly has the power under Section 10(a) to forbear from requiring the LECs to file tariffs.

V. Industry Standards Are Needed For Electronic Filing (Paras. 21-22)

Most commenters agree that electronic filing and posting of streamlined tariff filings on the Internet is desirable, and that the Commission should provide e-mail notice of streamlined tariff filings to interested parties to aid them in responding under the short notice periods that will apply to such filings.[21] However, the Commission should not underestimate the technical challenges in developing a common electronic filing format. While many commenters offered suggestions on how electronic filings could be made and what software packages would be suitable, the record on how an electronic

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[21] *See, e.g.,* Ad Hoc at pp. 6-7; AT&T at pp. 13-15; GSA at pp. 9-10.

filing system should be designed, built, and operated is far from complete. For example, AT&T's suggestion that files should be downloadable in Lotus spreadsheet form and as ASCII text files overlooks the fact that the industry uses many different computer programs, some of which are custom made, and most of which cannot be easily converted to a particular commercial software program. Moreover, ASCII text files would lose the formatting that makes the tariff pages intelligible.

As NYNEX and other commenters recommended, the Commission should establish an industry working group to develop standards to convert files to a Web publishing format, and the Commission should consider such standards in establishing its requirements for submission of tariff data.[22]

Several commenters agree with NYNEX that it would be more efficient to require the LECs to make their tariffs available to interested parties electronically, rather than to post all tariffs on the Commission's computer.[23] The Commission should reject AT&T's baseless claims that the LECs would "manipulate" or "tamper" with their electronic files to prevent potential petitioners from examining the tariffs.[24] The Commission should not presume bad faith on the part of the LECs, and any such activities would be easily

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[22] *See* NYNEX at pp. 16-18; CITI at pp. 5-6; GSA at p. 10; Sprint at p. 5.
[23] *See, e.g.*, Ad Hoc at p. 6; GSA at p. 9.
[24] *See* AT&T at pp. 14-15.

detectable in any event. Moreover, it is simply impractical to require the Commission to maintain the tariff filings of all of the LECs on its server.

VI. The Commission Should Review Most Filings Before They Become Effective, But It Should Not Adopt Burdensome Filing Requirements As Part Of Such Review (Paras. 23-26)

While NYNEX agrees with the commenters who support pre-effective tariff review for most filings, we do not agree with the commenters who believe that the Commission should adopt burdensome filing requirements to facilitate such review. Several commenters support the Commission's proposal to require the LECs to submit additional data, including summaries of their proposed tariffs, descriptions of how the tariffs differ from current terms and conditions, an analysis of the impact on customers, and an analysis showing that the tariffs are lawful under applicable rules.[25] McLeod wants the Commission to require the LECs to perform legal research on behalf of potential petitioners by submitting an analysis of any previous Commission orders that would demonstrate that the tariff filing was unlawful.[26] None of these commenters demonstrates how its proposals are consistent with the Congressional directive to streamline tariff filings. Their efforts to make streamlined tariff filings more

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[25] *See, e.g.*, AT&T at p. 12; Cap Cities at p. 10; TRA at p. 11.
[26] *See* McLeod at pp. 5-6.

burdensome than normal tariff filings flies in the face of the Congressional effort to deregulate the tariff-filing process.

In the name of pre-effective review, some commenters also propose measures that would undermine Section 204(a)(3). For example, MFS proposes that the LECs be required to provide 30 days' notice of planned streamlined tariff filings, effectively extending the notice periods from 7 and 15 days to 37 and 45 days, respectively.[27] Several commenters agree with the Commission's suggestion that certain types of streamlined tariffs would be presumptively subject to deferral or suspension, directly contrary to the statutory directive that streamlined tariffs shall be "deemed lawful."[28] Ad Hoc argues that the Commission should require streamlined tariffs to be accessible before 10:00 AM, which would expand upon the statutory notice periods.[29] These proposals are inconsistent with the Act, and they should be rejected.

VII. The Commission Should Establish Realistic Filing Periods For Petitions And Replies For Streamlined Tariff Filings (Paras. 27-28)

AT&T proposes unrealistic and unfair filing periods for replies to petitions to suspend and investigate streamlined tariff filings. AT&T proposes that petitions against tariffs filed on 7 days' notice be made in 3 business days,

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[27] *See* MFS at p. 10.
[28] *See, e.g.*, CompTel at pp. 6-7; AT&T at p. 12.
[29] *See* Ad Hoc at p. 6.

but that replies be due within one calendar day.[30] With regard to tariffs filed on 15 days' notice, AT&T proposes to retain the current 7 calendar day period for filing petitions, but to reduce the period for replies from the current 4 calendar days to 2 calendar days.[31] AT&T argues that this is fair, since the LECs "have complete control over the date on which they choose to make tariff filings."[32] However, the LECs have no control over the types of issues that may be raised by petitioners, and one day is clearly insufficient for the LEC to prepare a response to a petition to suspend and investigate a 7 day filing. Also, AT&T offers no reason why the Commission should reduce its current 4 day filing period for replies to petitions to suspend and investigate 15 day filings.

The Commission should adopt filing periods that allow 4 days for replies to petitions against 15 day filings, and 2 days for replies to petitions against 7 day filings. All filing periods should be based on calendar days. Assuming that petitions are due within 7 days for 15 day filings and 3 days for 7 day filings, this will ensure that the Commission will always have 4 days (in the case of 15 day filings) and 2 days (in the case of 7 day filings) after the pleadings have been filed to determine whether to suspend and investigate streamlined tariff filings.

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[30] *See* AT&T at p. 15.
[31] *Id.*
[32] *Id.* at n. 30.

VIII. The Commission Should Impose A Standard Protective Order For Confidential LEC Information (Para. 29)

Several parties oppose the Commission's proposal to issue a standard protective order when a LEC claims in good faith that the data it submits with a streamlined tariff filing qualifies as confidential.[33] They argue that this would impede the ability of the public to comment on LEC tariffs. This argument has no merit. Protective orders would not prevent advocates for parties who are affected by LEC tariffs from analyzing and commenting on the data underlying streamlined tariffs. However, the orders would prevent such parties from using confidential LEC data for competitive purposes. This is especially important in light of the fact that the Telecommunications Act of 1996 allows all carriers to enter all markets. Therefore, all of the carriers that obtain tariffed services from the LECs are actual or potential competitors. As the Commission notes, the shortened time periods involved in streamlined tariff filings will not permit case-by-case examination of requests for confidential treatment. A rule adopting standard protective orders would strike a reasonable balance between the LEC need to protect confidential data and the carriers' need to examine the data supporting LEC tariffs.

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[33] *See, e.g.*, Ad Hoc at p. 11; Sprint at pp. 7-8; TRA at pp. 12-13; GSA at p. 14; MCI at pp. 25-26.

IX. The Commission Should Streamline Annual Access Tariff Filings (Paras. 30-31)

Several commenters support the Commission's proposal to require the LECs to file certain tariff review plan ("TRP") data in advance of the annual access tariff filings.[34] For instance, AT&T argues for filing of TRP data 90 days in advance of the tariff effective date, and it also argues that the LECs should pre-file similar data 30 days in advance of mid-term tariffs that change the price cap indexes.[35] None of the commenters explain how this would be consistent with the Act. The fact that the proposed rates would not be included in the TRP data is immaterial. TRP data are part of the tariff filing, and a requirement that these data be submitted on more than 15 days' notice would be inconsistent with Section 204(a)(3).[36]

Moreover, pre-filing of TRP data is not necessary. As many commenters point out, TRP data without the proposed rates is of limited usefulness.[37] It would contain primarily the exogenous cost changes and the price cap index changes. However, these calculations have become less controversial in recent years, especially since the Commission decided in Docket 94-1 that exogenous

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[34] *See, e.g.*, AT&T at pp. 16-17; CompTel at p. 7; GSA at p. 15; MCI at p. 28; Frontier at p. 5.

[35] *See* AT&T at p. 16.

[36] *See* 47 C.F.R. Section 61.45(a), which requires the LECs to "file adjustments to the PCI for each basket as part of the annual price cap tariff filing."

[37] *See, e.g.*, Sprint at p. 8; BellSouth at p. 17.

cost changes shall be limited to those permitted by rule, rule waiver, or declaratory ruling.[38]

For these reasons, the Commission should retain its current requirement that the LECs file their TRP data with the other annual access tariff filing data, and the Commission should adopt a 15 days' notice period for the annual filing. Also, as NYNEX explained in its comments, the Commission should take this opportunity to reduce the amount of data that the LECs must submit with their annual access tariff filings, in recognition of the reduced need for such data under price caps and of the Congressional directive to streamline tariff filings.

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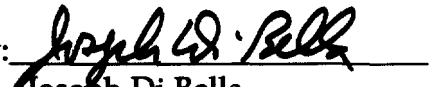
[38] *See* 47 C.F.R. Section 61.45(d). As NYNEX pointed out in its comments, the annual access tariff filings raise far fewer issues than were raised prior to the establishment of price caps, and only approximately $6,000 of NYNEX's $3 billion in annual access charges were disputed in the last filing. *See* NYNEX at p. 25.

X. Conclusion

For the foregoing reasons, the Commission should adopt NYNEX's proposals for streamlining the tariff filing process. The Commission should not adopt measures proposed by some commenters that would place additional burdens on streamlined tariff filings, or that would be inconsistent with the Congressional directive that such filings shall be deemed lawful if not suspended and investigated before they go into effect.

Respectfully submitted,

The NYNEX Telephone Companies

By: 
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Dated: October 24, 1996

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